

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 6289 of 1998  
with  
CIVIL APPLICATION NO.10703 OF 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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UNION OF INDIA

Versus

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LOTUS CONSTRUCTION

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Appearance:

MR JAYANT PATEL for Petitioners

MR CH VORA for Respondent No. 1

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CORAM : MR.JUSTICE M.S.SHAH  
Date of decision: 06/05/1999

ORAL JUDGEMENT

This appeal is directed against the judgement and order dated 17th April 1999 passed by the learned 3rd Joint Civil Judge (Senior Division) Kutch at Bhuj

allowing the application for appointment of arbitrator being Special Civil Suit No.21 of 1998.

2 The facts leading to the present appeal, briefly stated, are as under:- The respondent-plaintiff was given a contract for carrying out certain works in the defence organisation i.e. provision of certain RCC structure at Bhuj. After the execution of the agreement at Jaipur, the work was transferred as per the order dated 28th July 1997 from Chief Engineer, Jaipur Zone, to Chief Engineer, Ahmedabad Zone, Ahmedabad.

The said officer is now redesignated as Chief Engineer, Air Force, Ahmedabad. The plaintiff completed the work on 30th July 1988. Thereafter in the year 1991 the plaintiff demanded appointment of arbitrator and ultimately on 27th January 1998 the authority appointed the Engineer from the Standing Panel of Arbitrators at Lucknow Contonment. However, out of the eight items for which the plaintiff demanded reference, only four items were referred to the Arbitrator by the Engineer-in-Chief, Army Headquarters, New Delhi. The other four items were not referred to the Arbitrator. The plaintiff, therefore, filed the present suit on 11th March 1998 under section 20 of the Arbitration Act, 1940. The following defendants were jointed as parties to the suit:-

(i) Union of India  
Through Engineer-in-Chief  
Army Head Quarter  
Kashmir House  
DHQ, PO New Delhi

(ii) Chief Engineer  
Jaipur Zone  
Jaipur

(iii) Shri G.S.Mehta, CSW  
Office of the Standing Panel  
of Arbitrators  
5, Campbell Lines  
Nehru Road, Lucknow Cantt.

The trial Court initially made the summons returnable on 21st March 1998. Since none appeared on behalf of the defendants in spite of service of summons, the trial court adjourned the hearing of the suit to 17th April 1998. In the meantime the Chief Engineer, Jaipur, sent the papers to the Chief Engineer, Ahmedabad, vide letter dated 21st March 1998, with a copy endorsed to the plaintiff. Admittedly, the Chief Engineer, Air Force,

Ahmedabad, received the papers on 2nd April 1998 and thereafter the papers were forwarded to the Company Works Engineer (Works), Bhuj, on 6th April 1998. Still the defendants did not appear before the Civil Court when the hearing took place on 17th April 1998. The trial court therefore proceeded with hearing of the application for appointment of arbitrator and passed the impugned order which is challenged in the present appeal.

3 Mr Jayant Patel, learned counsel for the appellant, Union of India, has raised the following contentions:-

- (i) Since the Arbitration & Conciliation Act, 1996 (the 1996 Act, for short) came into force on 27th August 1996, no application was maintainable before the Civil Court for appointment of an arbitrator.
- (ii) The impugned order was passed ex parte by the Civil Court without the appellant getting the fair opportunity to appear before the Civil Court to oppose the application, and
- (iii) Even under the Arbitration Act, 1940 (hereinafter referred to as the 1940 Act) the Civil Court has also not examined the question whether the disputes referred to the arbitrator were referable to the arbitrator in view of the arbitration clause contained in the agreement.

4 As far as the first contention is concerned, it is required to be noted that the first demand was made by the plaintiff for the appointment of Arbitrator and the same was served on the respondents on 1991 i.e. prior to the date of commencement of the 1996 Act. Sections 85 read with Section 21 of the 1996 Act provide that the provisions of 1940 Act shall apply in the arbitration proceedings which commenced before 26.8.1996. Section 21 of the 1996 Act further provides that, unless otherwise agreed by the parties, the arbitration proceedings in respect of a particular dispute shall be deemed to have commenced on the date on which the demand to refer the dispute to arbitration was received by the respondent. Since that event admittedly took place in the year 1991, the arbitration proceedings had commenced in 1991. This principle is also explained by the Hon'ble Supreme Court in its decision in the case of SHETTY CONSTRUCTION PRIVATE LIMITED V. KONKAN RAILWAY (1990) 5 SCC 599. In view of the aforesaid direct decision of the Apex Court, the first contention must fail.

5 As far as the second contention is concerned, in view of the facts narrated hereinabove, it is clear that

the defendants were served with the summons and the Chief Engineer, Jaipur, had forwarded the papers to the Chief Engineer, Ahmedabad, on 21st March 1998. The papers were thereafter forwarded by the Chief Engineer, Ahmedabad, to the concerned officer called Company Works (Engineer) on 6th April 1998 but even then no appearance was filed before the trial court till the application came to be heard on 17th April 1998. Hence, no fault can be found with the trial court for proceeding with the hearing of the application for appointment of Arbitrator. The defendants were given reasonable opportunity and time.

6 As far as third contention is concerned, reference is required to be made to the decision of the Apex Court in the case of RENUSAGAR POWER CO. LTD. V. GENERAL ELECTRIC COMPANY reported in AIR 1985 SC 1156. In paragraph 25 of the said decision, the following principles have been laid down:-

"25. Four propositions emerge very clearly from the authorities discussed above:

1. Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.
2. Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.
3. Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the Court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.
4. If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made

a distinction between questions as to the existence and/or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement, i.e. to decide the issue of arbitrability of the claims preferred before him."

The arbitration clause is not brought to the notice of this Court. However, the learned counsel for the respondent - plaintiff states that the plaintiff is agreeable to defendant no.3 deciding the questions as to whether the particular items ordered to be referred by the Civil Court to the Arbitrator were referable to the Arbitrator under the arbitration clause. In view of the aforesaid agreement and the legal position, it will certainly be open to the Arbitrator to decide the effect and scope of the arbitration clause i.e. to decide the issue of arbitrability of the claims referred before him.

7 In view of the aforesaid discussion, there is no merit in any of the contentions raised on behalf of the appellants. The appeal is, therefore, dismissed with a clarification that it will be open to the appellants to raise the question about arbitrability of the four claims which are referred to the arbitrator by the order of the civil court and the arbitrator shall be at liberty to decide the question without being influenced by the fact that the disputes have been referred to him by the Civil Court.

8 Since the appeal is dismissed, Civil Application No.10703 of 1998 does not survive and is accordingly disposed of.

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